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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

MORARJI DESAI,

*Petitioner,*

v.

SEYMOUR HERSH,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In the context of this court's decisions in *New York Times v. Sullivan* and *Trammel v. United States* may Federal courts construe state "Shield Statutes" to effectively deprive plaintiffs of their ability to litigate defamation cases by holding that persons who have the occupation of "reporter" are entitled to claim a "reporter's privilege" to conceal so-called "confidential sources" yet testify before the jury of the sources' existence when the defamation is in a book authored by the defendant and not obtained for, or used in, a "news medium" by the defendant.

2. Is there a "reporter's privilege" which exists under the First Amendment to the United States Constitution which allows an author of a book to conceal the identity of his claimed sources, and if so, is it qualified, and if qualified, in what manner?

3. Must the ground for objection appear unequivocally in the body of the motion to strike itself or may it be made in memoranda in support of the motion and in objections at trial under Fed. R. Evidence 103(a)(1)?

## LIST OF PARTIES

The parties to proceedings below were the petitioner, Morarji Desai, former Prime Minister of India, and the respondent, Seymour Hersh, author. In addition, James Silberman, Summit Books, Hugh Collins and Kroch's & Brentano's were defendants who were voluntarily dismissed by the petitioner.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

The petitioner, Morarji Desai, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above proceedings on January 28, 1992 and the denial of petitioner's petition for rehearing on March 26, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 954 F.2d 1408 and is reprinted in the Appendix hereto, p. 1a, *infra.*

The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division (Norgle, J.) has not been reported. It is reprinted in the Appendix hereto, p. 13a, *infra.*

## JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sec. 1332 (a)(2), the petitioner brought this suit in the Northern District of Illinois on June 17, 1983. On October 11, 1989, the Northern District entered judgment on a jury verdict in favor of the respondent, and on January 31, 1990, denied the petitioner's post-trial motion.

On petitioner's appeal, the Seventh Circuit on January 28, 1992, affirmed the judgment of the District Court, and on March 26, 1992, denied petitioner's petition for rehearing (Appendix, p. 12a).

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

### Amendment I

Congress shall make no law . . . abridging the freedom . . . of the press . . .

## STATUTES INVOLVED

### Illinois Code of Civil Procedure, Ill.Rev.Stat., Ch. 110, Sec. 8-901 *et seq.* (1989)

*Section 8-901. Source of Information.* No court may compel any person to disclose the source of any information obtained by a reporter except as provided in Part 9 of Article VIII of this Act.

*Section 8-902. Definitions.* As used in this Act:

(a) "reporter" means any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium on a full-time or part-time

basis; and includes any person who was a reporter at the time the information sought was procured or obtained.

(b) "news medium" means any newspaper or other periodical issued at regular intervals and having a general circulation; a news service; a radio station; a television station; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing.

(c) "source" means the person or means from or through which the news or information was obtained.

*Section 8-903. Application to Court.*

. . .

(b) in libel and slander cases where a person claims the privilege conferred by Part 9 of Article VIII of this Act, the plaintiff may apply in writing to the court for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of information.

*Section 8-904. Contents of Application.* The application provided in Section 8-903 of this Act shall allege: the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; the specific information sought and its relevancy to the proceedings; and, . . . in libel and slander cases, the necessity of disclosure of the information sought to the proof of plaintiff's case. Additionally, in libel and slander cases, the plaintiff must include in the application provided in Section 8-903 a prima facie showing of falsity of the alleged defamation and actual harm or injury due to the alleged defamation.

. . .

*Section 8-906. Consideration by Court.* In granting or denying divestiture of the privilege provided in Part 9 of Article VIII of this Act, the court shall have due re-

gard to the nature of the proceedings, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

*Section 8-907. Court's Findings.* An order granting divestiture of the privilege provided in Part 9 of Article VIII of this Act shall be granted only if the court, after hearing the parties, finds:

. . .

(2) that all other available sources of information have been exhausted and, in libel and slander cases, the plaintiff's need for the disclosure of the information sought outweighs the public interest in protecting the confidentiality of sources used by a reporter as part of the news gathering process under the particular facts and circumstances of each particular case. . . .

. . .

*Federal Rule of Civil Procedure 46.*

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefore

. . .

*Federal Rule of Evidence Rule 103.*

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or exeludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if

the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

. . .

*Federal Rule of Evidence Rule 403.*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues . . .

## STATEMENT OF THE CASE

### A) Introduction

The defamation of Morarji Desai,[1] a former Prime Minister of India, which is the subject of this lawsuit is in *The Price of Power: Kissinger In The White House*, by Seymour Hersh. In Chapter 32, "The India-Pakistan War", Hersh accuses Desai of selling secrets of the Indian government to the United States Central Intelligence Agency during the Johnson and Nixon administrations, particularly in 1971 when India and Pakistan went to war.

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[1] From 1930 to 1947, Desai participated as one of Mahatma Gandhi's chief lieutenants in the non-violent movement to gain India's independence from Britain, being imprisoned for much of that time. From 1946 to 1956, he was one of the ministers of the State of Bombay, being its Chief Minister from 1952 to 1956. In 1957, he was elected to the Indian national parliament where he served for more than two decades. During his parliamentary tenure, he held several positions in the Indian cabinet, including Finance Minister under Nehru and Indira Gandhi and Deputy Prime Minister under Indira Gandhi. He ultimately became Prime Minster of India on March 24, 1977, and remained as such until July 15, 1979. Currently, he is the chancellor of Gujarat Vidyapith, a university founded by Mahatma Gandhi.

**B) The Book**

*The Price of Power* portrays Henry Kissinger as a modern Iago.[2] According to Hersh, Kissinger became National Security Advisor by spying on the Paris peace talks for the Nixon campaign in 1968, agents of which in turn persuaded President Thieu of South Vietnam to thwart any possible agreement before Nixon's election victory over Hubert Humphrey (*Price of Power*, Chapter 1, pp. 11-24). Each of the remaining 40 chapters describes Kissinger and Nixon foreign policy during Nixon's first term with respect to a particular subject as China, Berlin or SALT.

The thrust of the book is that, without exception, Kissinger was led to serious error in all matters by reason of his anti-Communism. The latter made him see "Russians behind every sand dune in the Middle East" (*Id.* at 234), not to care "who was in the right or in the wrong, as long as the Russians were punished" (*Id.* at 226), and to believe that "no action to stop the spread of communism was immoral" (*Id.* at 296). "The policy of the Nixon administration . . . had only one constant in 1969 and early 1970: Nixon and Kissinger could, so it seemed, be counted upon to try to stop the Russians no matter what the merits of the issues were" (*Id.* at 224). With respect to Pakistan and India, it was Kissinger's anti-Soviet paranoia that made him say to Nixon, "We can't allow a friend of ours and China's to get screwed in a conflict with a friend of Russia's" (*Id.* at 457). Assertedly, Kissinger's potential for harm was enhanced because his anti-Communism was abetted by others, including Desai.[3]

---

[2] Nixon is no Othello. Hersh quotes Roger Morris, a National Security Council Aide who quit in 1970 (at 190), and another unnamed aide for gossip supposedly originating with Kissinger himself that Nixon, a drunken "nut", had sodomized his Secretary of State or *vice versa*. (108-9).

[3] Others included not only Nixon (53), but also labor leaders Thomas W. Gleason and Jay Lovestone (p. 344), NSC Aide Law-

(Footnote continued on following page)

**C) The Chapter**

Chapter 32 concerns American foreign policy decisions concerning the 1971 India-Pakistan War, a crisis in which the United States adopted a controversial, hard-line policy against India and in favor of West Pakistan. Soon after West Pakistan commenced a war against the secessionist forces of East Pakistan on March 25, 1971, reports of war atrocities—including the killing of women and children—began reaching the international press. (*Id.* at 444-5). Hersh observes that while "most nations" immediately reacted by denouncing West Pakistan, "the United States—at the specific direction of the White House—remained mute" (*Id.* at 445). According to Hersh, Nixon and Kissinger were reluctant to criticize West Pakistan (then Pakistan) because they viewed its president, Yahya Khan, as "their conduit to the Chinese" and a summit meeting in Peking. (*Id.*) This policy of favoring Pakistan, particularly over India, both of whom were friendly nations, during 1971 was known as "tilting" toward Pakistan (*Id.* at 448)

In May, 1971,

> "a miraculous new element emerged to buttress the seemingly incomprehensible White House policy: highly classified evidence that Mrs. Gandhi was planning to attack East Pakistan. In mid-May, Kissinger wrote, he and Nixon learned "from sources heretofore reliable" that "Mrs. Gandhi had ordered plans for a

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[3] *continued*
rence Eagleburger (30) Deputy Under Secretary U. Alexis Johnson (34), State Department Asia Expert Alfred Jenkins (492), CIA Station Chief Henry D. Hecksher (261), Ambassadors Edward Korry (267) and William Porter (511) and Prime Minister Golda Meir (229), who, by their "harsh" (30) "tough-minded" (344), "hard line" (33), "relentless" (34), "fervent" (344), "reactive" (230), "vigorous" (261), "fierce" (267), "virulent" (344), and "unrelentingly hostile" (492) anti-Communism, subjected the world to unnecessary tension and human sacrifice. According to Hersh, Kissinger's criticism of an assistant Secretary of State to the Joint Chiefs of Staff as "soft on the Soviets" "could only be described as brutal" (417).

lightning "Israeli-type" attack to take over East Pakistan".[4] (*Id.* at 449-50)

In August, 1971, the United States also received intelligence that the Soviet Union had agreed to sign a friendship treaty with India on August 9, 1971 as "the price for an indefinite delay in India's plans to recognize East Pakistan" (as Bangladesh) (*Id.* fn. 452-3). Although Kissinger attributed the May information to "sources", *supra*, Hersh attributes both the May and August information to the same "source". (*Id.*)

After Yahya Khan launched a surprise attack against eight Indian airfields on December 3, 1971, India responded with rapidly successful ground offensives into East and West Pakistan (*Id.* at p. 457). The White House on December 10, 1971 sent a Naval Task Force with the aircraft carrier Enterprise into the Bay of Bengal as a show of force to India and the Soviet Union (*Id.* at 460-1).

At pp. 459-60 of *Price of Power*, Hersh quotes Kissinger's own book, *The White House Years* 901 (1979) for the justification which was utilized by Kissinger for sending the task force:

> "A report reached us from a source whose reliability we had never had any reason to doubt and which I do not question today, to the effect that Prime Minister Gandhi was determined to reduce even West Pakistan to impotence." Kissinger said that the intelligence showed Gandhi would proceed with the "liberation" of the southern part of the Pakistani province of Kashmir, long an area of dispute between Pakistan and India, "and continue fighting until the Pakistan army and air force were wiped out".

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[4] This is a quotation taken by Hersh from Kissinger's book, *The White House Years* 856 (1979).

Hersh contends that in reality the Soviet Union had been encouraging India to avoid conflict (*Id.* at 459). As of December 12, 1971:

> . . . Prime Minister Gandhi was also under pressure from Moscow to offer an unconditional cease-fire in the West, where the Indian Army had made substantial ground gains. Moscow's repeated assurances to the White House that India sought no wider war was not enough for Kissinger and Nixon, who chose to believe their hard-line intelligence from inside the Indian cabinet. Nixon and Kissinger had another, more immediate goal in all of this. If there was to be a successful cease-fire in East and West Pakistan, credit would be theirs. (*Id.* at 462).

**D) The Libel**

The identity of the source was never revealed by the Indian or American governments. However, Hersh writes:

> The informant was undoubtedly Morarji Desai, a prominent Indian politician who was fired from the post of Deputy Prime Minister by Indira Gandhi in 1969—but stayed in her cabinet after a bitter political dispute . . . He was a political reactionary and a bitter opponent of Prime Minister Gandhi . . . (*Id.* at 450)

Hersh specifically cites unidentified government "officials" to establish Desai's link with the CIA (*Id.* at 450):

> Desai was a paid informer for the CIA and was considered one of the Agency's most important "assets" . . .
>
> Former American intelligence officials recall that Desai was a star performer who was paid $20,000.00 a year by the CIA during the Johnson Administration through the 303 Committee, the covert intelligence group that was replaced by the 40 Committee under Nixon and Kissinger. One official remembers that Desai continued to report after Nixon's election,

much of his information having to do with contacts between the Indian government and the Soviet Union. According to this official, Kissinger was "very impressed with the asset. He couldn't believe it was really in the bag."

**E) The Suit**

The book was published on June 8, 1983, and suit was filed on June 17, 1983. After this suit was filed and prior to trial, Hersh revised the second edition of the book at page 450 to delete the words, "but stayed in her cabinet", and to substitute, "but stayed in Parliament", with reference to Desai's status after 1969. By interrogatories, Desai asked Hersh for the identify of the sources who said that Desai was a CIA informant. Hersh refused to answer. On April 20, 1984, Desai filed a motion for an order precluding Hersh from relying on, or referring to, unidentified confidential sources at trial.

It was not until more than five years later, after the case went to trial on September 13, 1989, that the District Court ruled. On September 18, 1989 (not September 13, 1989 as stated by the Court of Appeals, 954 F.2d at 1410; Appendix, p. 4a), the court announced its ruling. A copy of the transcript of the judge's oral ruling is attached hereto. (Appendix, pp. 23a-24a). A written opinion was issued on October 4, 1989 (Appendix, pp. 13a *et seq.*).

Judge Norgle held that the Illinois Shield Law [Ill.Rev. Stat., Ch. 110, Sec. 8-901 *et seq.* (1989)] and this Court's opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964), mandated that Hersh could not be compelled to disclose his sources (Appendix, p. 17a):

> Penalizing a media defendant for relying on a "newsman's" privilege, especially where that privilege has been codified and its invocation not subject to challenge by the plaintiff, would be contrary to principles

underlying the first amendment. It would upset the balance of interests struck by *New York Times* and its progeny by lowering the barriers to recovery by a public official or figure plaintiff, thereby raising the spectre of self-censorship on matters of public concern which the Supreme Court sought to minimize. Therefore, the court will not preclude Hersh from relying on confidential sources. Neither can defendant's reliance on the privilege be considered evidence of falsity or of "actual malice". Furthermore, a refusal to disclose identifying information about confidential sources cannot preclude Hersh from testifying as to the substance of the information and the reliability of the unnamed sources. (citation.) It would be ironic to recognize a privilege and then penalize its proper invocation.

**F) The Trial**

At trial, Desai, then 93 years old, testified by videotaped deposition and heatedly denied that he was the spy. Henry Kissinger testified that he was given notice by three separate means if a spy existed who had the prominence of Desai. Kissinger testified that although he was not given the names of spies, he was given identifying information and the Indian spy was not Desai. Kissinger testified that he had verified his testimony with Richard Helms, the Director of the Central Intelligence Agency. There was no evidence that Desai was the spy.

J.N. Parimoo, a Washington, D.C. based reporter, testified that a day or two after the book was published, he interviewed Hersh at the latter's office. Hersh claimed to have documents to substantiate his claim and pointed to files marked "CIA", and "Top Secret". When Parimoo asked to see the documents, Hersh refused. At trial, Hersh testified that he never saw any documents which identified Desai as a CIA informant. He did not testify

about Parimoo's interview of him or otherwise deny Parimoo's testimony.

Hersh testified that he always knew that Desai was out of the cabinet as of 1969 and had no explanation as to why the first edition placed Desai in the cabinet after the chapter had undergone a number of drafts. The chapter has numerous sentences which repeatedly convey the same thought.[5]

There was evidence of a motive for Hersh to say that Desai "stayed in her cabinet". Powers, *The Man Who Kept Secrets: Richard Helms & The CIA* 206 (1979), had identified the source as "an agent in the Indian cabinet". Powers' book, according to Hersh, was "serious", because it had as one of its sources Richard Helms. Jack Anderson, who published classified documents relating to the "tilt" in December, 1971 (*Price of Power* at 465), described the source as "close to Mrs. Gandhi", *Anderson Papers* 232 (1973). Hersh, who wrote that the spy was "undoubtedly" (*Price of Power* at 450), "was obviously" (*Id.* at 453), "could only have been Morarji Desai" (*Id.* at 459), testified only that he "doubted" that Powers was right. Hersh testi-

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[5] "During meetings with CIA and other officials dealing with international crises, he (Kissinger) would occasionally smile knowingly and say to Helms or one of his deputies, 'Why can't you have a source in the cabinet?' " (450), ". . . American officials inadvertently provided another hint that the reports (from Desai) were continuing by stressing the high position . . . of the source they used in late 1971 . . ." (450 fn.), "Amidst all the blustering by the men at the top of the American government, the CIA received a report—allegedly from inside the New Delhi cabinet—that was full of tough talk from Prime Minister Gandhi . . . There was (a) flaw in the intelligence . . . By late 1971 . . . the Indian cabinet, as a whole did not discuss sensitive military issues. Mrs. Gandhi instead relied on a small subcabinet committee into which the CIA was not likely to penetrate." (459-60). "Moscow's repeated assurances to the White House that India sought no wider war was not enough for Kissinger and Nixon, who chose to believe their hardline intelligence from inside the Indian cabinet." (462).

fied that he did not check with Powers or share information with Anderson.[6]

Hersh's justification for publication was:

> I thought the most important thing was to know that the sources upon which I was relying were sources that I had the utmost confidence in, and that was the driving force of what I wrote . . .

In answers to interrogatories Hersh stated that he relied on six confidential sources whom he identified as "Source A", "a former NSC official", "Source B", "a long time CIA official", etc. In his trial testimony, Hersh added a seventh source—an Indian Foreign Service Officer who reviewed the manuscript for accuracy and approved by silence the text with respect to Desai.

In his testimony, Hersh admitted saying in the summer of 1983 just after publication that there were only two sources in interviews by Reuters News Service and Assem Chhabra, a New York based reporter, but said that he did so because two sources were "terribly active in a very unusual way", ". . . very outgoing, informative and explicit in presenting (him) with the kind of detail it is hard for a journalist to get about an American asset".

However, in his testimony he described three "active" sources, Source "A", an NSC official who told Hersh that Desai received $20,000.00 per year during the Johnson and Nixon Administrations, Source "C", formerly of the CIA clandestine service, who told Hersh that Desai "covered our ass", *i.e.*, concealed "from the rest of the Indian Government" the implanting of plutonium powered devices in the Himalaya Mountains by the Indian intelligence

[6] Hersh's "Chapter Notes" for chapter 32 states: "Anderson gave me copies of all his material, including a number of documents that he did not publish at the time" (*Id.* at 659).

agency (Central Bureau of Investigation) and the CIA to monitor Chinese nuclear tests, and Source "D", a former State Department and NSC official who told Hersh he saw the "new Desai report" in December, 1971.

Hersh testified that he believed Source "A" because the source told Hersh that Desai visited Washington, D.C. in 1968 and thus had "inside" information. This visit is described in Desai's autobiography which Hersh read before he wrote the book and never was a secret.

According to "note" of the interview which Hersh purportedly had with Source "C", this source told Hersh that Desai had been a member of Shastri's cabinet, L.B. Shastri having been Prime Minister from June, 1964 to January, 1966, at which time Indira Gandhi became Prime Minister. The implanting of the monitoring devices took place between 1964 and 1966.

However, Desai was out of the cabinet from August 1963 to March, 1967. Hersh initially testified that he knew that Desai did not reenter the cabinet until 1967 and then testified that he did not know. Hersh admitted "skim reading" Desai's autobiography, published in 1979, which has the correct information.

Hersh admitted that he saw an article in the Chicago Tribune on April 14, 1978 which stated that Desai, then Prime Minister, reported to Parliament that an investigatory commission had determined that the implanting was done with the approval of the prime ministers at that time. Hersh also admitted that he read the book of Daniel Moynihan, former Ambassador to India, entitled *A Dangerous Place* (1978), in which Moynihan states at page 41 that Indira Gandhi knew about at least one of the devices, but Hersh denied seeing that page.

The book itself, as well as Hersh's testimony, regarding Source "D" is contradictory. Hersh testified that this

source, as described on page 460, actually saw the "new Desai report" in December, 1971 before a meeting of the Washington Special Action Group began.[7] But on page 450 in the footnote, Hersh states that after *1970*:

> . . . the officials who were willing to discuss Desai's information with me were no longer in a position to see his reports, which presumably continued to flow to Washington.

According to Hersh, his "confidential sources" did not have personal knowledge of Desai's purported CIA connection; they told him that they heard from other unspecified persons. Hersh displayed his "notes" of conversations with the sources, which notes were given to the jury.

Hersh had no personal knowledge concerning Desai. Hersh did not know who served in Mrs. Gandhi's cabinet or if any were from Desai's party at the time of Desai's alleged spying activities. Hersh, who does not speak any of the Indian languages except English, was in India only once in his life when he changed planes in New Delhi. Hersh admittedly made no attempt to verify the story with Desai, Kissinger or Nixon.[8]

The jury returned a special verdict in favor of Hersh, and the District Court entered judgment accordingly.

**G) The Court of Appeals**

The Court of Appeals decided that the District Court was in error in allowing Hersh to testify about undisclosed sources (Appendix, p. 9a):

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[7] Kissinger testified that Richard Helms did not rush into the meeting with this report as Hersh states melodramatically on 460; the report, which was not from Desai, had been distributed in the usual manner.

[8] Desai testified that since he resigned as prime minister in 1979, he has met regularly with the public.

> The District Court, in effect, treated the privilege as absolute. And as the Supreme Court has stated, granting an absolute privilege is neither required or authorized, and would substantially enhance the burden of proving actual malice. *Herbert v. Lando*, 441 U.S. 153, 170, 99 S.Ct. 1635, 1645 (1979).

The Court of Appeals, however, overlooked that the trial court's ruling was based on its conclusion that *New York Times v. Sullivan*, 376 U.S. 254 (1964) "constitutionalized" the Illinois Shield Law and required the court to give an absolute privilege as to the identity of the purported sources (Appendix, pp. 13a, 15a-18a).

The Court of Appeals then went on to hold that, under Federal Rule of Evidence 501, the Illinois Shield Law was applicable even under the doctrine of strict construction, that the prejudice to plaintiff resulting from concealment of purported sources outweighed the probative value of evidence to Hersh on the issue of responsible publication under Federal Rule of Evidence 403, but that plaintiff failed to object with sufficient specificity under Federal Rule of Evidence 103(a)(1) to call the District Court's attention to this problem, Appendix, p. 9a:

> The attention of the district judge was not directed to the balancing requirements of Rule 403 which direct the district judge to determine whether the probative value of the evidence sought to be excluded by Hersh was substantially outweighed by the danger of unfair prejudice to Desai.

However, in its opinion the District Court specifically noted that plaintiff had objected on this basis, Appendix, page 15a:

> Plaintiff asserts that it is unfair for defendant both to enjoy the benefits of the "newsman's" privilege to keep his sources confidential and also to use at trial the information supplied by these sources, after defendant has, by the exercise of the privilege, se-

> verely restricted the ability of the plaintiff to test its reliability. On one hand, defendant deprives the plaintiff to obtain evidence of "actual malice", while, on the other hand, the defendant uses the information which he has insulated as the basis for his defense.
>
> . . . The disadvantage is substantial because if the information proving truth supplied by the confidential sources is accepted by the trier of fact, then it is extremely difficult for the plaintiff to prove that the defendant in fact entertained serious doubts as to the truth of his publication no matter what contrary evidence the plaintiff proffers.

The Court of Appeals ruled, Appendix, p. 9a:

> Desai could not take refuge in the exception to this requirement that the grounds of his objection were apparent from the context of his single pre-trial motion for preclusion based merely on "fairness, equity and applicable law."

While the motion to preclude did not state that the probative value of the evidence sought to be excluded by Hersh was substantially outweighed by the danger of unfair prejudice to Desai, that point was unmistakably made in memorandum in support of the motion and by objections made at trial.[9]

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[9] Plaintiff's motion was argued by the parties in eight separate memoranda:

Desai Motion to Preclude filed 4/24/84;
Simon & Shuster, et al. Memorandum in Opposition to Motion filed 8/15/84;
Hersh Memorandum in Opposition to Motion filed 8/13/84;
Desai Memorandum in Support of Motion filed 10/19/84;
Simon & Shuster Sur-Reply filed 12/10/84;
Hersh Rejoinder filed 2/25/85;
Desai Response to Sur-Reply and Rejoinder filed 6/17/85;
Desai Motion to Cite Additional Authority filed 11/18/86;
Hersh Supplemental Brief filed 1/26/87.

Two of Plaintiff's memoranda, Desai Memoranda in Support of Motion filed 10/19/84 and Desai Response to Sur-Reply and Rejoinder filed 6/17/85 are quoted in the appendix.

## REASONS FOR GRANTING WRIT

### I.

### THE COURT OF APPEALS' HOLDING THAT THE ILLINOIS SHIELD STATUTE APPLIED TO HERSH IS BOTH CONTRARY TO THE PLAIN MEANING OF THE STATUTORY LANGUAGE AND THIS COURT'S RULE OF STRICT CONSTRUCTION FOR EVIDENTIARY PRIVILEGES.

This case involves the appearance of fairness of the American legal system, if not its ability to protect significant figures or officials of foreign countries (and the people and values they represent) who have had scandalous untruths promulgated about them in the United States.

The Court of Appeals ignored the District Court's conclusion that *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny have established a First Amendment "standard" of disclosure of claimed "confidential sources", that being that disclosure will be made only "if there is a compelling interest in obtaining relevant information unavailable through alternate means", which standard has been "incorporated in state shield laws, *see e.g.*, Ill. Rev. Stat., Ch. 110, § 8-901 *et seq.* (the Illinois Shield Law)" (Appendix, pp. 15a-16a).

The Court of Appeals then found under the First Amendment a "general rule . . . that . . . ordinarily the reporters privilege must give way to disclosure. . ." (Appendix, p. 8a). The Court of Appeals, however, held, contrary to the plain meaning of the statute and this Court's rule of strict construction of evidentiary privileges, that the Illinois Shield Law applied simply because Hersh, by occupation, was a reporter as shown by the facts that he had worked as a newspaper reporter prior to beginning work on the book in 1979 and wrote magazine articles during the time he was writing this book (Appendix, pp. 6a-7a) [work described at page 699 (unnumbered) of *Price of Power*].

Under Section 8-902 of the statute, the privilege is extended to a "reporter" collecting or writing "news" for a "news medium". A written "news medium" is defined as "any newspaper or other periodical issued at regular intervals and having a general circulation". It is questionable whether the subject matter of the book is "news". Hersh himself classified it as "history". Clearly the book does not fit the definition of a "news medium". During the time he was writing the book, Hersh also wrote articles for the *New York Times* on a CIA relationship with Libya and another article for the *Atlantic Monthly* on White House wiretaps. Hersh never claimed that any statement involved in this case was based on information he discovered as a reporter or was used by him in his work as a reporter.

The Court of Appeals did recognize that testimonial rules and exclusions must be strictly construed and,

> "accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normal predominant principal of utilizing all rational means for ascertaining truth' ", quoting *Trammel v. United States*, 445 U.S 40, 51 (1980) as quoted in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 189 (1990).

However, it gave such a liberal construction to the Illinois Shield Statute that the privilege surpasses, and is inconsistent with, the privileges of attorney-client, penitent-confessor, doctor-patient and even husband and wife. For these privileges, the information must be given to the attorney as attorney, *Matter of Walsh*, 623 F.2d 489, 494 (7th Cir. 1980), *cert. denied*, 449 U.S. 994 (1980), to the confessor as such, *Trammel v. United States*, 445 U.S. 40, 51 (1980), or to the doctor for the purpose of treatment, *People v. Florendo*, 95 Ill.2d 155, 447 N.E.2d 282

(1983), or to a spouse during the relationship, *United States v. Byrd*, 750 F.2d 585, 592 (7th Cir. 1985).

Very recently, this Court declared in a case which involved a confidential source, *Cohen v. Cowles Media Co.*, 501 U.S. ____, 115 L.Ed.2d 586, 111 S.Ct. 2513, 2518 (1991):

> It is therefore beyond dispute that "(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privileges to invade the rights and liberties of others", quoting *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-3 (1937).

If Hersh's work as a reporter prior to working on the book is significant, a reporter may take a sabbatical or retire and then write any libel which occurs to him or his "silent partners". If Hersh's work on a magazine article is significant, a reporter can include a page or two of such privileged material in any book he chooses to write (or none at all) so long as he is a reporter when he writes the book and thereby insulate the remaining 700 or so pages for any libelous comment he chooses.

As set forth in Section II, *infra*, many states have enacted such Shield Statutes to provide some answers as to when a news reporter (or other writer in some instances) may properly refuse to reveal claimed sources.

This case raises the issue of whether, in the context of *New York Times v. Sullivan* and its requirements, as well as *Trammel v. United States*, Federal courts may construe these "Shield Statutes" so as to effectively deprive plaintiffs of the ability to litigate defamation cases when a so-called reporter refuses to disclose his claimed sources by allowing him to testify as to their existence and reliability without disclosing their identities no matter what medium the defendant uses for his assertions.

## II.

## THE FIRST AMENDMENT GUARANTEE OF FREEDOM OF THE PRESS PROVIDES NO ABSOLUTE RIGHT TO AN AUTHOR TO CONCEAL HIS CLAIMED SOURCES, AND A QUALIFIED RIGHT TO DO SO IS NOT APPLICABLE IN THIS CASE.

While the Court of Appeals did not give it recognition, the District Court held that the Illinois Shield Statute was a codification of a "newsman's privilege" existing by reason of the First Amendment. (See page 18, *supra*, Appendix, pp. 13a, 15a-18a).

Almost thirty years after the decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), there is question as to whether, by its marriage, so to speak, with a "newsman's privilege", it has ceased being simply a protection for full, untrammelled disclosure for "open and robust debate" by the public on matters of general concern, and rather has become, like the *scutum* of the Roman legionnaire, a weapon behind which a writer may hide while hurling falsehoods about a public figure with impunity.

To grant a writer a presumption that "confidential sources" exist and are as reliable as he expressly or impliedly claims is unwarranted. Some have recognized that the protection of so-called "confidential sources" has led to manipulation of the press by such informants, particularly those in government, Levi, "Dangerous Liaisons: Seduction and Betrayal In Confidential Press-Source Relations", 43 *Rutgers L. Rev.* 609, 611-3, 712-3 (1991). It would be disingenuous to claim to believe that some writers for personal reasons[10] or for compensation by other gov-

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[10] References to "confidential sources" clothe the piece in a mystique which can be so dramatic it might result in a Pulitzer Prize even though the piece is false, Levi, *supra* at 690, 691 fn. 287, 694 fn. 296.

ernments, political opponents or others also would not find it worth the risk of publishing information which is false[11] because they can claim to rely on confidential sources, the very existence of which need not be demonstrated. The cynicism which the American people have shown to some of the charges leveled in the most recent primary season is indicative of a growing distrust of the "information" which they are getting. Cynicism, however, is no substitute for knowing what the truth is.

The most important right a citizen has is the right to vote, *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Its use is dependent on the electorate being well informed.[12] The ability of the press, not simply to inform but to influence public opinion, is enormous. Because of its ability to give shape to events, the national media has been likened to a "shadow government", Levi, *Id.* at 672-3, fn. 221, 689 fn. 283; Cf. *Miami Herald Tribune Publishing Co. v. Tornillo*, 418 U.S. 241, 248-51 (1974); dissenting opinion of Justice White in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 390-1 (1974).

Spreading false information in and of itself carries no First Amendment credentials, *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Gertz v. Robert Welch, Inc., id.*, 418 U.S. at 340. The electorate should not have its opinions on issues molded by disinformation about those who are on

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[11] *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

[12] "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised and a free press is thus indispensable to a free society", dissenting opinion of Justice Stewart in *Branzburg v. Hayes*, 408 U.S. 665 at 726 (1972). "In a country like ours, where the people purport to be able to govern themselves through elected representatives, adequate information about their government is of transcendent importance", concurring opinion of Justice White in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 767 (1985).

one side or the other of a particular issue.[13] It need not be limited to choosing between those candidates who are willing to submit to the "gut-check" of a campaign of falsehoods, dissenting opinion of Justice White in *Gertz v. Robert Welch, Inc.*, *id.*, 418 U.S. at 400.

The law of libel has as its primary purpose the protection of the reputation of individuals, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), concurring opinion of Justice Stewart at 92 quoted with approval in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, ____, 111 L.E.2d 1, 110 S.Ct. 2695, 2707-8 (1990). However, in the process of a libel trial, truth plays a pivotal role, *Garrison v. Louisiana*, *Id.*; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). As such, the law of libel is not only consistent with the First Amendment's purpose of protecting the publication of the truth but serves to further it, see concurring opinion of Justice Stewart in *Rosenblatt v. Baer*, *id.*, 383 U.S. at 93-4.[14]

It is inevitable that there will be falsehoods in free speech, *Herbert v. Lando*, *Id.*; *Gertz v. Robert Welch Co.*, *id.*, 418 U.S. at 341. Persons honestly attempting to publish the truth who are not reckless in their efforts must be protected from liability for errors made honestly, even negligently. It is therefore necessary for the public figure

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[13] ". . . (T)hese First Amendment values are not at all served by circulating false statements of facts about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen confidence in government", concurring opinion of Justice White in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, *id.* 472 U.S. at 765.

[14] "Moreover, the preventative effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interest. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society".

not simply to prove actual malice, but also to do so by clear and convincing evidence, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 255-6 (1986).

At present, there is a division amongst the courts as to whether there is a First Amendment "reporter's privilege". Most Courts, as did the Court of Appeals in this case, recognize a qualified privilege. These courts have adopted differing, albeit similar, tests for deciding the issue of disclosure, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. Okla. 1977), *later opinion*, 464 U.S. 238 (1984); *United States v. Criden*, 633 F.2d 346, 358-9 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Matter of Contempt of Wright*, 108 Idaho 418, 700 P.2d 40, 43-4 (1985). They differ strongly on how this evidence should be weighed.

The Court of Appeals in this case held, 954 F.2d at 1412, Appendix, p. 8a, that "ordinarily the reporters' privilege must give way to disclosure", citing Louisell & Mueller, *Federal Evidence*, Sec. 238, Journalists' Privilege, pp. 1118-1119, and *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725-6 (5th Cir. 1980) *cert. denied*, 450 U.S. 1041 (1981).[15] Others have held that ordinarily the reporters' privilege must be given effect, District Court opinion in this case; *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Dallas Morning News v. Garcia*, 822 S.W.2d 675, 680-2 (Tex. Ct. App. 1991).[16]

Some courts have held that there is no such privilege, *Capuano v. The Outlet Co.*, 579 A.2d 469, 475-6 (R.I. Sup. Ct. 1990); *Rubera v. Post-Newsweek Station*, 8 Media L. Rep. (BNA) 2293 (Conn. Super. Ct. 1982); *Gagnon v. Fre-*

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[15] As Supreme Court precedent, these cases rely on *Branzburg v. Hayes*, *id.* and *Herbert v. Lando*, *id.*

[16] These courts, like the District Court, place emphasis on *New York Times v. Sullivan*, *id.*

*mont District Court*, 632 P.2d 567 (Colo. Sup. Ct. 1981); *DeRoburt v. Gannett Co., Inc.*, 507 F.Supp. 880 (D. Hawaii, 1981); *Downing v. Monitor Publ. Co.*, 120 N.H. 383, 415 A.2d 683, 19 A.L.R.4th 913 (1980).

Given the uncertainty as to what the First Amendment requires, many states have enacted Shield Statutes, see "Shield Statutes, Confidential Sources & Information: A Practical Guide for Reporters in 50 States", 14 *News Media & The Law*, S1 at S9, Fall, '90. These statutes differ widely due, in part, to the uncertainty as to what the First Amendment means.

To interpret the First Amendment so as to add the further barrier that a writer need not be required to reveal any "confidential source" which he claims to have in either all (as the District Court did), or in only the "most exceptional cases", is an invitation to libel and to public debate predicated in part on lies and reckless falsehoods.

Such a holding means, as was done in this case, a writer in a libel case may testify about how impressive his confidential sources were and display to the jury, with the blessing of the court, his "notes" of his meetings with them—without being required to reveal whom he claims as sources. Such a holding is to invite jury consideration of writings potentially equivalent to "Hitler's Diary" and yarns as factual as Clifford Irving's "Autobiography of Howard Hughes", Watson, "Cracking The Case", and Adler and Seward, "Fakes, Forgers and Fraud" *Newsweek* May 16 '83 58 and 61.[17] As stated in the dissent

[17] Hersh relies upon awards which the book won as well as the fact that he has won a Pulitzer Prize to create a presumption of integrity and care. However, Chapter 32 has other contradictions. In the first edition, Hersh had the population of West Pakistan at 55 million being "six times larger than that of the East" (*Price of Power* 446 fn.) which had 75 million (*Id.* at 446). Hersh wrote

(Footnote continued on following page)

of Mr. Justice Stevens, in which Justices White and Rehnquist concurred, in *Philadelphia Newspapers, Inc. v. Hepps*, *id.*, 475 U.S. at 785:

> I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can neither be verified nor disproved. The danger of deliberate defamation by reference to unprovable facts is not a mere speculative or hypothetical concern.

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[17] *continued*

this not only in the face of the population figures, but the fact that the East Pakistanis had won a majority in the Pakistan National Assembly (*Id.* at 444, 446). After this suit was filed, Hersh revised this footnote in the second edition to state that West Pakistan had six times more *land* than East Pakistan.

When stating that Nixon and Kissinger subsequently relied on the information of December, 1971, to justify their policies, Hersh writes, 460:

> They did so with the knowledge that the information turned out to be incorrect since India did not invade West Pakistan.

Earlier in the chapter, Hersh states, 457:

> The attacks (of the Pakistani Air Force) . . . provided justification for Mrs. Gandhi to order a full scale offensive in East Pakistan, and a more limited retaliation in the West, where Indian troops seized thousands of square miles of territory within a few days. . . The day after the surrender in the East, Gandhi offered Yahya Khan an unconditional ceasefire in West Pakistan, and in negotiations concluded a month later, she agreed to withdraw her troops from the occupied areas of the West.

Also, to show the peace efforts of Russia, Hersh writes, 462:

> At that point, Prime Minister Gandhi was also under pressure from Moscow to offer an unconditional ceasefire in the West, where the Indian army had made substantial ground gains.

Later, to show that Kissinger's and Nixon's intervention though Moscow to urge restraint upon Mrs. Gandhi was a futile exercise, Hersh quotes Indira Gandhi as saying, 463:

> "The Soviet Union did not speak to me about the matter", she told a journalist, "We had no intention of doing anything with West Pakistan."

## III.

**THE COURT OF APPEALS' DECISION UNDER RULE 103(a)(1) OF THE THE FEDERAL RULES OF EVIDENCE IS WITHOUT FACTUAL BASIS AND IMPROPER IN LIGHT OF THIS COURT'S INTERPRETATION OF RULE 103(a)(2).**

A right accorded by the United States Constitution may not be abridged by a statute, *e.g.*, *Miami Herald Tribune Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That being the case, Judge Norgle had no occasion to decide on the basis of Federal Rule of Evidence 403 because he held that the Illinois Shield Law was compelled by the First Amendment.

The petitioner objected on the ground that the prejudicial effect of this testimony outweighed its probative value. Plaintiff never cited Rule 403 by number, and the text of the motion to preclude did not make the substance of the rule apparent from its context. However, in his memoranda, the plaintiff argued, that it would be unfair to allow Hersh to testify concerning the "reliable" nature of the sources as proof he published responsibly (as a sword) while denying the plaintiff the right to inquire as to anything which might identify the "source" (as a shield) because to do so would eliminate effective cross-examination on the subject. The plaintiff argued that to allow testimony from Hersh as to how he relied on these sources without allowing plaintiff to probe by determining identity was so prejudicial that Desai would be denied a fair trial. (Appendix, pp. 25a-26a).

In summarizing the plaintiff's argument, the defendant Hersh himself recognized the point the plaintiff was making, as shown by the excerpts from his briefs contained in the appendix.[18]

[18] Page 27a of Appendix.

In raising the matter for the court's consideration at the outset of the trial and during the testimony of Hersh, the plaintiff made further oral objections (See Appendix, pp. 19a-22a, 28a-29a). As shown by the express language of the District Court's opinion, the judge understood the plaintiff's argument, but rejected them because of the " 'constitutionalization' of defamation law . . .", (pp. 15a, 17a of Appendix). Defendant did not claim on appeal that this issue had been waived by failure to object.

This court has not yet ruled on Fed.R.Evid. 103(a)(1), but it has ruled with respect to Rule 103(a)(2). In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), this Court ruled that a question put by counsel during trial was sufficient to make known the substance of the evidence sought to be admitted, even though counsel did not explain the grounds for admission, citing Rule 46 of the Federal Rules of Civil Procedure. In so ruling, the court stated, 488 U.S. at 174-5:

> Moreover, the judge's response suggests that he perceived the completeness argument. We cannot say that the point was not sufficiently made.

This court should make clear that Rule 103 in all its aspects is not a talisman to be used to dispose of appeals. If a party has fairly apprised the court and opposing counsel of his position, which position is understood, he has satisfied Rule 103 and all of its subsections.

## CONCLUSION

For these various reasons, this writ of certiorari should be granted. The matter should be remanded to the District Court for the entry of an order precluding the respondent from testifying as to any sources which he refuses to disclose and for a new trial.

Respectfully submitted,

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# APPENDIX

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

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Nos. 90-1435 and 90-2207

MORARJI DESAI,

*Plaintiff-Appellant,*

*v.*

SEYMOUR HERSH,

*Defendant-Appellee.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 4232—**Charles R. Norgle,** *Judge.*

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ARGUED DECEMBER 5, 1990—DECIDED JANUARY 28, 1992

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Before COFFEY and KANNE, *Circuit Judges*, and GRANT, *Senior District Judge.**

KANNE, *Circuit Judge.* Courts and scholars alike have expressed their concern that the public's interest in a free press and open news dissemination might be severely inhibited if journalists were required to reveal the identity of their confidential sources. The disclosure of these sources, however, is often critical to a defamed individual's hopes for preserving his or her reputation, particularly in those instances where the individual is a public figure

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* The Honorable Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

who must establish that the defendant published the statement at issue with actual malice or reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). These competing interests come into conflict in this libel action, where we are asked on appeal by the former Prime Minister of India to find that the district court improperly allowed author Seymour Hersh to testify at trial concerning the background and reliability of his sources—without ever disclosing their identity.

The plaintiff, Morarji Desai, has played a prominent role in Indian politics and public life throughout his career. From 1930 to 1947, he participated in the nonviolent movement to gain India's independence from Britain. In 1957, he was elected to the Indian national parliament where he served for more than two decades. During his parliament tenure, he held several positions in the Indian Cabinet, including Deputy Prime Minister and Finance Minister under the government of Prime Minister Indira Gandhi. He ultimately became Prime Minister of India on March 24, 1977, and remained as such until July 15, 1979. Currently, he is the vice-chancellor of the Gujarat Vidyapith, a university founded by Majatma Gandhi.

In his book, *The Price of Power: Kissinger in the Nixon White House*, defendant Seymour Hersh examines how former National Security Advisor Henry Kissinger conducted U.S. foreign policy during President Richard Nixon's first term. Included in Hersh's commentary is a chapter reviewing the U.S. foreign policy decisions concerning the 1971 India-Pakistan War, a crisis in which the United States adopted a controversial, hard-line policy against India and in favor of West Pakistan.[1] According to Hersh,

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[1] Soon after West Pakistan commenced a war against the secessionist forces of East Pakistan on March 25, 1971, reports of war atrocities—including systematic elimination of women and children—began reaching the international press. Hersh observes that while "most nations" immediately reacted by denouncing West Pakistan, "the United States—at the specific direction of the White House—

(Footnote continued on following page)

President Nixon and Dr. Kissinger justified this policy based largely on information received from a "reliable source" reporting from India through the Central Intelligence Agency. The identity of the source who furnished this information was never revealed by the National Security Council or the CIA.

Desai's libel claim focuses on Hersh's assertion that the Indian-CIA source was "undoubtedly Morarji Desai." In the passage at issue, Hersh specifically cites several unidentified government "officials" to establish Desai's link with the CIA:

> Desai was a paid informer for the CIA and was considered one of the Agency's most important "assets."
>
> * * *
>
> Former American intelligence officials recall that Desai was a star performer who was paid $20,000 a year by the CIA during the Johnson Administration through the 303 Committee, the covert intelligence group that was replaced by the 40 Committee under Nixon and

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[1] *continued*

remained mute." *Price of Power* at 445. According to Hersh, Nixon and Kissinger were reluctant to criticize East Pakistan because they viewed its president, Yahya Khan, as "their conduit to the Chinese" and a potential summit meeting in Peking. *Id.* Thus, when Khan carried the war to the Indian front by launching a surprise attack against eight Indian airfields on December 3, 1971, the White House was groping for some rationale for "tilting" towards West Pakistan. Hersh concludes:

> [A] miraculous new element emerged to buttress the seemingly incomprehensible White House policy: highly classified evidence that Mrs. Gandhi was planning to attack East Pakistan. In mid-May, Kissinger wrote, he and Nixon learned "from sources heretofore reliable" that Mrs. Gandhi had ordered plans for a lightning 'Israeli-type' attack to take over East Pakistan." The evidence, taken at face value in the White House, confirmed his and Nixon's view that as "Pakistan grew more and more isolated internationally, she [Gandhi] appeared to seek above all Pakistan's humiliation."

*Id.* at 450.

> Kissinger. One official remembers that Desai continued to report after Nixon's election, much of his information having to do with contacts between the Indian government and the Soviet Union. According to this official, Kissinger was "very impressed with the asset. He couldn't believe it was really in the bag."

*Price of Power* at 450. Desai's pleadings denied that he ever had any connections with the CIA, and alleged that Hersh published these statements knowing they were false or with reckless disregard as to their falsity.

By interrogatory, Desai asked for the identities of the sources who formed the basis for Hersh's conclusion, but Hersh refused each request. Subsequently on April 20, 1984, Desai filed a motion for an order precluding Hersh from relying on or referring to any unidentified confidential sources at trial.

It was not until five years later on September 13, 1989, that the district court ruled that it would deny Desai's motion. In a written opinion issued on October 4, 1989, the district court first pointed out that Desai had failed to make any motion to compel Hersh to reveal the identities of his sources pursuant to § 8-903 of the Illinois Reporter's Privilege Law, a statute designed to protect the confidentiality of a reporter's sources. The court then held that invocation of the Illinois Reporter's Privilege would not prohibit Hersh from testifying about the reliability of his confidential sources even though their identities would not be revealed:

> The court concludes that the proper exercise of the "newsman's" privilege will not be penalized by precluding defendant's reliance on confidential sources
>
> . . . .

However, the court did permit Desai to inquire into the existence and reliability of Hersh's confidential sources—but without requiring them to be identified.

During his testimony at trial, Hersh explained that he relied on six separate confidential sources to support his

assertion that Desai was a CIA informant. Hersh testified that of the six sources, "two were out of government, one was in the CIA, one was in the world of the NSA, National Security Agency, which is the communications intelligence people, and two were working in the White House." Two of these sources he characterized as "active sources" who "were telling me details, a lot of detail." And, at one point during his direct testimony, Hersh stated that "I thought the most important thing was to know that the sources upon which I was relying were sources that I had the utmost confidence in, and that was the driving force of what I wrote."

The jury returned a special verdict in favor of Hersh and the district court entered judgment accordingly. Although Desai now raises several issues on appeal, only one merits discussion: whether the district court properly permitted Hersh to testify at trial regarding the reliability of his confidential sources without revealing their identity.

Illinois enacted a reporter's privilege statute on July 1, 1982. The privilege, as then codified, provided as follows:

> No court may compel any person to disclose the source of any information obtained by a reporter during the course of his or her employment except as provided in Part 9 of Article VIII of this Act. The privilege conferred by these Sections is not available in any libel or slander action in which a reporter or news medium is a party defendant.

Ill. Rev. Stat., ch. 110, § 8-901 (1982). The Illinois Legislature subsequently amended the reporter's privilege on September 16, 1985, by extending the application of the privilege to libel and slander cases, and by specifying requirements for seeking disclosure in such cases. Ill. Rev. Stat., ch. 110, §§ 8-903, 8-904 and 8-907 (1989).

Rule 501 of the Federal Rules of Evidence requires a federal court in civil cases and proceedings to determine the existence of a privilege in accordance with state law

if the privilege supplies the rule of decision with regard to an element of a defense.[2] However, although the extension of the Illinois Reporter's Privilege to Hersh is determined by state law, the collateral effects of invoking this privilege (or any privilege, for that matter) during a federal trial are not immune from the application of the Federal Rules of Evidence. Indeed, testimonial privileges must be strictly construed to give effect to federal evidentiary requirements. *See Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 912 (1980). In undertaking a balancing test between testimonial privilege in another context and the need for probative evidence, the Supreme Court reiterated the general rule that "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' . . . As such [privilege laws] . . . must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normal predominant principle of utilizing all rational means for ascertaining the truth.' " *Id.* (citations omitted); *accord University of Pennsylvania v. EEOC*, ____ U.S. ____, 110 S. Ct. 577, 582 (1990).

In this case, there is no doubt that the Illinois Reporter's Privilege Law determines the issue of whether Hersh should

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[2] Rule 501 provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

be afforded protection from disclosing the identities of his sources.[3] *See* Fed. R. Evid. 501; *Armour Int'l Co. v. Worldwide Cosmetics, Inc.*, 689 F.2d 134, 135 (7th Cir. 1982). Nor is there any question that Desai did not make any application for seeking disclosure of Hersh's sources as prescribed in § 8-907(2) of the Illinois Privilege Law. It is also true, however, that when this action was commenced (and for a period thereafter) there was no state statutory mechanism for seeking the identity of a reporter's sources; as we have noted earlier, the Illinois Privilege Law did not apply to libel until the enactment of the 1985 amendments. Yet even after the passage of these amendments, Desai declined to seek disclosure of Hersh's sources following Hersh's earlier refusal to provide them in discovery. Instead, Desai relied solely on his 1984 motion which requested that Hersh be precluded from relying or referring to any unidentified confidential sources at trial. We are now asked to determine whether the district court improperly denied that motion—an evidentiary decision collateral to the issue of whether Hersh can invoke the protection of the Illinois Reporter's Privilege Law.

An essential factor in ensuring fairness in the presentation and evaluation of evidence in any case, including a *Sullivan*-type libel action, is the application of Fed. R. Evid. 403, which precludes the admission of evidence which "although relevant . . . is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury . . . ." Proof of actual malice under *Sullivan* invariably depends on knowing the identity of the

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[3] We reject Desai's contention that reporters who author books are not protected by the Illinois Shield Law. The privilege extends to "any person who was a reporter at the time the information was procured or obtained." Ill. Rev. Stat., ch. 110, § 8-902(a) (defining reporter). A review of the record clearly indicated that Hersh researched his book while writing a series for the *New York Times Magazine* on the CIA's relations with Libya. Hersh had also worked for several other newspapers prior to the publication of *Price of Power*.

reporter's source, since a libel plaintiff needs to demonstrate that the reporter's source was unreliable or that the reporter failed to take sufficient steps to verify his or her story. *Zerelli v. Smith*, 656 F.2d 705, 714 (2d Cir. 1981); *Carey v. Hume*, 492 F.2d 631, 637 (D.C. Cir. 1974).[4] Without such information, however, inquiring into the reliability of these sources would be a futile exercise: reporters could volunteer information buttressing their defense, and then plead the privilege to prevent the disclosure of any detrimental facts. *See Laxalt v. McClatchy*, 116 F.R.D. 438 (D.Nev. 1987). Ultimately, juries would be forced to decide the question of malice based on the allegations of a plaintiff claiming libel and a defendant whose defense of reliable sources would be untested—a scenario which spells little hope of success for the plaintiff.

Here, the district court's evidentiary ruling effectively foreclosed Desai from obtaining the information necessary to meet his burden of proof under *Sullivan*. It would be exceedingly difficult for Desai to introduce evidence beyond his own testimony to prove that he was not a paid informant of the CIA. Even if he did succeed in establishing that the statements were false, Desai would still have to prove actual malice by showing that Hersh in fact had no reliable sources, that he misrepresented the reports of his sources, or that his reliance upon those particular sources was reckless. Desai would be hard-pressed to challenge the credibility of sources whom he cannot identify.

Not surprisingly, the general rule has been stated that in defamation actions in which a plaintiff must establish "malice" on the part of a defendant, ordinarily the reporters privilege must give way to disclosure. Louisell &

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[4] As Judge James Oakes pointed out, "[h]ow else could a plaintiff prove 'actual malice,' defined as knowledge of falsity or reckless disregard of truth or falsity, if not by the closest inquiry into the mind of the alleged defamer?" Hunter, *A Reprise on Herbert v. Lando and the Law of Defamation*, 71 Ky. L. J. 569, 583 (1983).

Mueller, *Federal Evidence* § 238 Journalists Privilege, pp. 1118-1119. *See also, Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725-26 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

Desai argues that by allowing Hersh to utilize reporters privilege and then permitting Hersh to vouch for the unnamed sources the district court virtually eliminated his ability to test the reliability—or even existence—of Hersh's sources. We agree. The district court, in effect, treated the privilege as absolute. And as the Supreme Court has stated, granting an absolute privilege to journalists to maintain the confidentiality of their sources in a libel case is neither required or authorized, and would substantially enhance the burden of proving actual malice. *Herbert v. Lando*, 441 U.S. 153, 170, 99 S. Ct. 1635, 1645 (1979).

Desai, however, failed to preserve this argument on appeal. In order to establish the predicate for any error on appeal for the admission of evidence, Fed. R. Evid. 103(a)(1) dictates that a timely objection or motion to strike "stating the specific ground for objection" must appear of record. Desai could not take refuge in the exception to this requirement that the grounds of his objection were apparent from the context of his single pretrial motion for preclusion based merely on "fairness, equity and applicable law."

Desai never made a specific objection to Hersh's testimony about his sources which called into play the Federal Rules of Evidence. The attention of the district judge was not directed to the balancing requirements of Rule 403 which direct the district judge to determine whether the probative value of the evidence sought to be excluded by Hersh was substantially outweighed by the danger of unfair prejudice to Desai. Absent the specificity required under Rule 103(a)(1) no error was preserved for our review. *See, e.g., United States v. Sandini*, 803 F.2d 123, 126 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) (Rule 403 objection not preserved without specificity). Therefore, the district judge's collateral determination that Hersh

could testify about the reliability and background of his sources without disclosing their identity cannot be disturbed on appeal. The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: January 28, 1992

BEFORE:

Honorable John L. Coffey, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Robert A. Grant, Senior District Judge*

Nos. 90-1435 and 90-2207

MORARJI DESAI,

Plaintiff-Appellant

vs.

SEYMOUR M. HERSH,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 4232, Judge Charles R. Norgle

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* The Honorable Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 26, 1992.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

MORARJI DESAI,
*Plaintiff-Appellant,*

No. 90-1435 and 90-2207 vs.

SEYMOUR HERSH,
*Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 4232—Charles R. Norgle, *Judge*

ORDER

On consideration of the petition for rehearing *in banc* filed in the above-entitled cause, no judge in active service requested a vote and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, of the Northern District of Indiana, is sitting by designation.

[Dated October 4, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MORARJI DESAI, | ) | |
| | ) | |
| Plaintiff, | ) | No. 83 C 4232 |
| | ) | |
| vs. | ) | Judge |
| | ) | Charles R. Norgle |
| SEYMOUR M. HERSH, | ) | |
| | ) | |
| Defendant. | ) | |

ORDER

What interest prevails when a democracy's interest in, and dependency upon, the free flow of information to the public, as constitutionally recognized in the first amendment and its corollary the "newsman's" privilege to protect confidential sources, comes into conflict with a free society's recognition of every person's right to protect his reputation from defamatory falsehoods through the judicial process? The motion of plaintiff, Maraji Desai, for an order precluding defendant, Seymour Hersh, from referring to or relying upon unnamed confidential sources at trial of this defamation action requires the court to reconcile these competing interests of fundamental importance.

Plaintiff alleges that he was defamed by certain statements made by defendant in his book, *The Prince of Power: Kissinger in the Nixon White House.* The statements in question, in sum, label Desai as a paid informant of the Central Intelligence Agency at a time when he was an official in the government of India. Because plaintiff is

a public figure, *see* Order dated May 30, 1989, he must not only prove that the statements in question were false and defamatory, but also carry the burden of proving that Hersh published the statements with actual malice—that Hersh knew that the statements were false at the time he published them or published them with reckless disregard of their truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). To prove "reckless disregard," plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Placing this enhanced burden on public official and public figure plaintiffs in defamation actions is necessary to ensure the free flow of speech on matters of public concern by minimizing the potential for self-censorship produced by the threat of a defamation action.

Necessarily, whether or not a defendant published a statement with "actual malice" is dependent upon the information the defendant had in his possession at the time of the publication and the reliability of that information. Thus, plaintiffs in defamation actions are understandably eager to learn the defendant's sources. In the course of discovery in this matter, Hersh has stated that he relied in part on six unnamed individuals as sources in making the allegedly defamatory statements. However, he has invoked a "newsman's" privilege and refused to identify the sources. Nevertheless, Hersh has indicated his intention to rely on these unnamed sources at trial, both in establishing his absolute defense of truth and as evidence of lack of "actual malice."

While plaintiff, perhaps respecting Hersh's invocation of the "newsman's" privilege (plaintiff himself refused to divulge confidential sources during his deposition), did not

move for an order compelling Hersh to identify the confidential sources, he objects to Hersh relying upon them at trial. Plaintiff asserts that it is unfair for the defendant both to enjoy the benefits of the "newsman's" privilege to keep his sources confidential and also to use at trial the information supplied by these sources, after defendant has, by the exercise of the privilege, severely restricted the ability of the plaintiff to test its reliability. On one hand, defendant deprives the plaintiff of the ability to obtain evidence of "actual malice," while, on the other, the defendant uses the information which he has insulated as the basis for his defense.

Courts have recognized the disadvantage at which a public official or figure plaintiff, already laboring under the weight of the "actual malice" standard, is placed when the defendant uses the "newsman's" privilege defensively and the information protected by the privilege offensively. *See Sharon v. Time, Inc.*, 599 F. Supp. 538, 582-84 (S.D.N.Y. 1984); *Dowd v. Calabrese*, 577 F. Supp. 238, 243-44 (D.C. 1983). The disadvantage is substantial because if the information proving truth supplied by the confidential sources is accepted by the trier of fact, then it is extremely difficult for the plaintiff to prove that the defendant in fact entertained serious doubts as to the truth of his publication no matter what contrary evidence the plaintiff proffers.

The Supreme Court, fearing that the balance struck in *New York Times* between the societal interest in free speech and the individual's interest in protecting his reputation would be upset, has declined to recognize a first-amendment-based evidentiary privilege protecting the editorial processes of a media defendant. *See Herbert v. Lando*, 441 U.S. 153 (1979). Thus, where a plaintiff has moved to compel the protection of confidential sources and

can demonstrate that there is a compelling interest in obtaining relevant information unavailable through alternate means, media defendants have been ordered to disclose confidential sources. *See Cary v. Hume*, 492 F.2d 631 (D.C. Cir. 1974). This standard, with modification, has been incorporated in state shield laws. *See, e.g.*, Ill. Rev. Stat. ch. 110, ¶ 8-901 et seq. (the "Illinois Shield Law"). Where the defendant refuses to disclose, there is precedent for an order prohibiting the defendant from relying upon the confidential sources at trial. *See DeRoburt v. Gannett Co. Inc.*, 507 F. Supp. 880 (D. Hawaii 1981). One court has chosen the less confrontational alternative of declining to compel the media defendant to disclose confidential sources, but then refusing to allow the defendant to rely upon confidential sources as evidence of truth or lack of "actual malice." *See Dowd v. Calabrese*, 577 F. Supp. 238 (D.C. 1983).

While plaintiff has not moved to compel disclosure, the defendant has invoked the Illinois Shield Law, asserting that the standards for preclusion are the same as those for compelled disclosure. It is more appropriate to view this dispute as one over the scope of "newsman's" privilege codified by the Illinois Shield Law. The court concludes that the proper exercise of the "newsman's" privilege will not be penalized by precluding defendant's reliance on confidential sources nor by allowing any adverse inferences on the elements of falsity or "actual malice." However, the scope of the privilege must be limited to that necessary to preserve confidentiality.

The Illinois legislature has recognized "the public interest in protecting the confidentiality of sources of information used by a reporter as part of the news gathering process . . . ." Ill. Rev. Stat. ch. 110, ¶ 8-907. Our democratic system has as its fundamental precept the ex-

ercise of free choice by the individual. Choice without information which forms the basis for rational decision is meaningless. Where decisions involve the conduct of governmental affairs, a free flow of information concerning the issues of the day is indispensable to the efficient operation, and ultimately the survival, of a democratic state.

Penalizing a media defendant for relying on a "newsman's" privilege, especially where that privilege has been codified and its invocation not subject to challenge by the plaintiff, would be contrary to principles underlying the first amendment. It would upset the balance of interests struck by *New York Times* and its progeny by lowering the barriers to recovery by a public official or figure plaintiff, thereby raising the spectre of self-censorship on matters of public concern which the Supreme Court sought to minimize. Therefore, the court will not preclude Hersh from relying on confidential sources. Neither can defendant's reliance on the privilege be considered evidence of falsity or of "actual malice." Furthermore, a refusal to disclose identifying information about confidential sources cannot preclude Hersh from testifying as to the substance of the information and the reliability of the unnamed sources. *See Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D. N.Y. 1984) (interpreting New York Shield Law). It would be ironic to recognize a privilege and then penalize its proper invocation.

Necessarily, recognition of the "newsman's" privilege has made a public official or figure plaintiff's burden of proving "actual malice" more difficult to carry. Yet, the need to balance public and private interests resulting from the "constitutionalization" of defamation law requires that the scope of the privilege be restricted to that necessary to promote the public interest in the free flow of information by preserving the confidentiality of sources with-

out unnecessarily impairing the individual's ability to protect his reputation. The privilege, after all, though invoked by the defendant, is for the benefit of the public.

Therefore, Hersh cannot, consistent with *Herbert v. Lando*, insulate his state of mind simply by asserting that the information came from confidential sources which he often used in the past and which were always reliable. To allow him to do so would expand the privilege beyond that necessary to protect the public interest in the free flow of information. Plaintiff may ask questions probing the existence and reliability of the confidential sources, provided he does not seek information which would directly or indirectly identify the source. This will not invade the privilege.

IT IS SO ORDERED.

ENTER:

/s/ CHARLES R. NORGLE
Charles Ronald Norgle, Judge
U.S. District Court

DATED: 10/4/89

VOLUME 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MORARJI DESAI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 83 C 4232 |
| | ) | |
| SEYMOUR M. HERSH, | ) | |
| | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS
*Before*
HON. CHARLES RONALD NORGLE
Judge
September 18, 1989

[147] * * * * *

THE COURT: Mr. Kappil.

MR. KAPPIL: Your Honor, we have before the Court a fully briefed motion, that is, plaintiff's motion to preclude sources. That has been briefed for some time. I believe it is critical we obtain a ruling on that. This way, I will know up front what type of arguments—statements to make to the jury.

There is two motions in limine, at least two or three. One has to do with Mr. Hersh's awards.

THE COURT: His what?

MR. KAPPIL: Special awards he received.

THE COURT: Special awards?

MR. KAPPIL: Yes, and prizes.

It's my understanding Mr. Nussbaum intends to refer to that in his case in chief and also at the opening [148] statement.

THE COURT: Okay, with respect to the awards, the motion to preclude is denied, and if Mr. Hersh takes the stand, as part of background information that may go to his credibility or the weight of his testimony, any awards that he may have received can be brought to the attention of the jury, and opposing counsel will have an opportunity to cross examine on those issues.

I will not, however, permit Mr. Nussbaum to spend too much time with respect to that, but it certainly does go to his credibility and does have some relevance in terms of Federal Rule 401 to the issues in this case. And I have considered it in terms of Federal Rule 403, and in the exercise of my discretion, I rule that you can go into the awards.

As to the source, I am in the process of writing a full opinion on the issue, but if you are asking me to rule now summarily—

MR. KAPPIL: Your Honor, before you make your ruling, I just found a decision from Judge Roszkowski from the Northern District of Illinois. It is a decision—

THE COURT: Did he decide it Friday? Where has it been?

MR. KAPPIL: I just found out over the weekend.

THE COURT: May I see it?

MR. M. NUSSBAUM: I haven't seen this before, your Honor. It was decided April 14, 1989.

[149] THE COURT: May I see a copy, counsel?

MR. KAPPIL: I did underline some of the points there, your Honor. I apologize.

MR. B. NUSSBAUM: Your Honor, would it be possible to have the name of the case and the citation for the record?

THE COURT: McLaughlin v. Lundy Truck Sales, 86 C 20318.

MR. B. NUSSBAUM: Thank you, your Honor.

THE COURT: See also 714 F.Supp. 920.

Have you given a copy to Mr. Nussbaum?

MR. KAPPIL: No, your Honor.

THE COURT: Do you want an opportunity to read this case?

MR. M. NUSSBAUM: I think that would be helpful.

MR. B. NUSSBAUM: If it has anything to do with the matter at hand.

THE COURT: This does go to the issue of source, is that correct?

MR. KAPPIL: Yes, your Honor.

THE COURT: Then I will take the time to read the case, and I will tell the jury we will be with them shortly.

(Recess.)

THE COURT: Mr. Nussbaum, have you had an opportunity to read the case?

Which one of you am I talking to? Michael? Michael Nussbaum, have you had an opportunity to read the case?

MR. M. NUSSBAUM: Yes, I will handle this issue. [150] I'm sorry, your Honor?

THE COURT: Have you had an opportunity to read the case?

MR. M. NUSSBAUM: Yes, I have.

THE COURT: Mr. Kappil, you may argue your point.

MR. KAPPIL: Mr. Hersh wants to use the privilege as a sword and a shield. He is asking the Court for a judicial license to call people bad names and hide behind the so-called privilege.

We will never be able to test as to whether or not the source, in fact, exists. The cases they cited go for the privilege that a journalist cannot be compelled to disclose

his sources in certain circumstances, but we're not—that issue is not before the Court.

The issue here is, Mr. Hersh says, I can call somebody a thief, a traitor, and I don't have to prove to anybody; I'm a journalist. The statute in Illinois was not enacted to give a license to journalists to assassinate innocent people in the media.

Now, he claims the privilege. If he wants to rely upon the privilege, then he should not be entitled to say, I—those sources exist.

I believe he waived it. The waiver argument is what Judge Roszkowski referred to. The moment he comes up with his source, he just waived it. And, your Honor, the rest of the arguments are fully briefed. Basically, the case I gave to the [151] Court earlier waives attorney-client privilege. We can draw a parallel here. The attorney says, based upon his review of the Department of Labor statistics, and directives, and rules and regulations, he gave advice. They claim—they interpose an affirmative defense in the case I cited to the Court earlier.

Mr. Hersh is doing the very same thing here. He is saying that I called Mr. Desai a traitor because somebody told me. He is claiming that as a defense.

That's it.

THE COURT: Okay, there are two Nussbaums in this case, so I don't know who's going to proceed.

You are Michael Nussbaum, is that correct?

MR. M. NUSSBAUM: Yes, sir.

THE COURT: And Mr. Bernard Bud Nussbaum is your brother, is that right?

MR. M. NUSSBAUM: That is correct, your Honor.

THE COURT: Okay, Mr. Michael Nussbaum, you may proceed.

MR. M. NUSSBAUM: Thank you.

Your Honor, I should introduce Mr. Seymour Hersh first to the Court and the Court to Mr. Seymour Hersh.

THE COURT: Good morning.

MR. M. NUSSBAUM: He is the defendant, and he is sitting next to Bud Nussbaum.

THE COURT: Yes. Do you wish to respond?

MR. M. NUSSBAUM: Very briefly.

[152] The attorney-client case which I just read this morning has nothing to do with this, and I will not address it. The Court has read the case. I have really only two points.

The First, the Third and the Fourth Circuits have all ruled that the kind of motion that the plaintiff here seeks should not be granted under this circumstance. So have a number of trial courts. Perhaps the case closest to this is the Cherone case, which I am certain your Honor is familiar with, where a pretrial motion like this was brought, and Judge Sofare said, no, I am not going to preclude the Time Magazine reports from referring to confidential sources; that is an issue for the jury. Mr. Kappil can make the arguments he made to your Honor to the jury.

Secondly, I know your Honor is familiar with the 1985 amendments to the Illinois shield law which expressly embraced this kind of protection in a libel and defamation case.

What really is happening here is that Mr. Kappil wishes the jury to believe something that isn't true—namely, that Mr. Hersh didn't talk to any sources. Unless the Court has any questions, I have nothing further to say.

THE COURT: First, with respect to privileges, the federal rule that comes into play is Rule 501, and so in applying Federal Rules of Evidence, the Court must look to the privilege in Illinois, and there is a statutory privilege which, in effect, codifies the common law journalist privilege.

[153] I said before that I am going to issue a full-page opinion on this matter, and that will be coming within the next couple of days; but in order for you to begin your opening statements, my ruling essentially is as follows, that although the journalist privilege and the statute are broad, they do not establish an absolute right or grant journalists complete immunity from all legal consequences. A refusal to disclose identifying information about sources, however, cannot preclude the journalist from testifying that he obtained information from what he considered to be trustworthy sources.

Furthermore, his reliance on the privilege should not be considered evidence of malice or knowledge of falsity. Hersh, however, cannot insulate his state of mind from scrutiny simply by asserting that the information obtained came from confidential sources.

Morarji Desai, the plaintiff, must have a right to probe without infringing on the privilege. Therefore, the plaintiff can inquire as to whether Hersh had any source, and to what extent the source gave him information that supports the statement, and whether Hersh had an adequate basis for believing the reliability of the source or the accuracy of the information, and questions on this line of inquiry will be admissible.

As to how far the probing can go, as the Court also considers the privilege, we will have to take it question [154] by question as objections are made during the course of the trial. There is no way for the Court to rule now on the very specific nature of the inquiry that may be made by the plaintiff.

I expect that the full opinion will be out in a few days, but essentially, that's what it will say. I think I have given you enough, now, so that you can take into account this ruling when you make your opening statements.

* * * * *

## EXCERPTS FROM DESAI'S MEMORANDA IN SUPPORT OF MOTION TO PRECLUDE

Desai's Memorandum of October 18, 1984 (Rec. Item 136) stated in part:

> In *Deitchman* [*v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984)], the information sought by a subpoena directed to a non-party enjoyed a qualified First Amendment privilege. Nevertheless, the Court ordered disclosure because a qualified First Amendment privilege cannot be used in a manner that precludes meaningful cross-examination. "Cross-examination is a fundamental right that a court should abridge only to curb abuse." *Id.* 740 F.2d at 562.
>
> In the present case, if defendants refer to and rely on the existence of Hersh's alleged reliable sources", which they have refused to identify, plaintiff will be prevented from engaging in any meaningful cross-examination (pp. 5-6 of memorandum)
>
> * * *
>
> If Hersh intends to rely on the existence of those sources, their credibility, reliability, and neutrality become important issues. (citation). (Page 14 of Memorandum).

In his response filed on June 14, 1985 (Rec. Item 185), Desai argued:

> . . . In *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S. 2d 988 (1979) a non-public figure plaintiff who was a doctor sued on the basis of defamatory statements made about him on a television show entitled "60 minutes". When plaintiff sought the identity of the sources for the statements at issue, the defendants refused to identify them under the privilege conferred by section 79-h of the New York Civil Rights Law. The Court pointed out that section 79-h was one of the broadest shield laws in the country and stated:
>
> "The Defendants have opted thereunder not to disclose their sources or their information but merely

to reveal that their sources were patients. Their refusal to disclose has deprived the plaintiff of access to valuable and material evidence on a critically element of plaintiff's cause of action. In short, the defendants rely on undisclosed sources and information for verification and offer this verification as proof of their responsibility. Thus, they have put in issue the very privilege upon which they rely. They are using the "Shield Law" affirmatively to prevent challenge by the plaintiff.

"Such exploitation of the statute vitiates the limited right to recovery that the plaintiff has as a private individual, and should not be permitted. This purpose was not intended by the legislature nor is such a use mandated by the First Amendment.

* * *

"[T]he fair solution, one which does not attenuate the policy considerations of the Statute, is to allow defendants to elect the future course of their defense. At trial, *if the defendants opt to rely on their statutory privilege, they should be precluded from any use of those sources, and information as proof of verification or evidence of responsibility*".

*Id.* 419 N.Y.S.2d at 996-997 (citation omitted; emphasis added).

Courts considering the balance between the journalist's qualified privilege to shield the identity of confidential sources and the opposing party's fundamental due process right to cross-examine have precluded use at trial of those sources. *Greenburg v. CBS, Inc., supra*, *Dowd v. Calabrese*, 577 F.Supp. 238, 244 (D.D.C. 1983). Indeed, such a preclusion order is appropriate regardless of the basis for the privilege because the courts have recognized that a privilege may be asserted only as a shield, not a sword, see, e.g., *International Telephone & Telegraph Corp. v. United Telephone Company of Florida*, 60 F.R.D. 177, 185 (M.D. Fla. 1973); *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) . . . (pp. 3-5 of Memorandum).

## EXCERPTS FROM HERSH'S MEMORANDA IN OPPOSITION TO MOTION TO PRECLUDE

In his memorandum of February 25, 1985, Hersh stated:

> As plaintiff would have it, his right to a fair trial demands that Hersh not be allowed to testify that he had sources unless they are identified by name. (Page 2).
>
> * * *
>
> Unlike the plaintiff in *Carey* [*v. Hume*, 992 F.2d 631 (D.C. Cir. 1974), *cert. dismissed sub nom. Hume v. Carey*, 417 U.S. 538 (1974)], plaintiff . . . argues only that he needs their identity to aid an attempt to impeach Hersh's expected defense that he relied on information from confidential sources (Reply at 3, 14) . . . (Page 5).

In his memorandum of January 26, 1987, Hersh argued, pp. 12-3:

> . . . By excluding any mention of confidential sources, a preclusion order would convey to a jury the false impression that Hersh published irresponsibly and without sources rather than the truth—he had multiple sources and acted responsibly in publishing the story . . .
>
> At the same time, the alleged prejudice to plaintiff from permitting Hersh to testify about his sources is far less than the actual prejudice held acceptable in *Coughlin* (*v. Westinghouse, Inc.*, 780 F.2d 340 (3rd Cir. 1986), *cert. denied*, 476 U.S. 1187 (1986)). Unlike the plaintiff in *Coughlin*, Desai . . . argues only that Hersh will raise his confidential sources as "a matter of defense" at trial and that he will be unable to effectively cross-examine such defense testimony.

## OBJECTIONS MADE BY DESAI'S COUNSEL DURING TRIAL

During the direct examination of Hersh on September 21st by plaintiff's counsel, the latter asked for a sidebar conference pursuant to Rule 103(c) of the Federal Rules of Evidence[1] when the issue of sources came up. (Tr. 603). Judge Norgle stated (*Id.*):

> I made a pretrial ruling on this issue and I think it's clear in the record as to what it is. Is this something in addition to what I have previously ruled on?

Counsel then pointed out that Hersh had just identified a person from the Indian diplomatic corps as a "source" but had not previously named him as one of his "six confidential sources". (Tr. 604-6). Counsel then stated:

> Mr. Baumgart:[2] I believe—and he's not been named. We have a right to go into the bias of the person to whom he gave it. (Tr. 604-5).

The court then read *verbatim* its decision of September 18th (Tr. 609-611). After hearing additional argument on this point (Tr. 615), the court ruled that even though the diplomat was not one of the six so-called "confidential sources" named in the answers to interrogatories, his identity could not be revealed (Tr. 616-617).

During the examination of Hersh by his own counsel on September 22nd, plaintiff's counsel again raised the issue after asking for a sidebar conference (Tr. pp. 738-9):

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[1] 103(c) provides: In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury . . .

[2] Baumgart is one of Plaintiff's counsel.

Mr. Kappil: . . . Now, if they go beyond just saying Source B, I object to that because I have no way of testing it.

* * *

Your Honor, they can make a Source B and say he is an ex-high executive in CIA which has maybe thousands of employees. They can just pick any source out of the air and describe him.

The Court: Well, I don't want to revisit the entire issue, because I've already made two statements on the records and its in the transcript as to my ruling on this point.

* * *